

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

BRENT NICHOLSON, *et al.*,
Plaintiffs,
v.
THRIFTY PAYLESS, INC., *et al.*,
Defendants.

No. C12-1121RSL

**ORDER GRANTING IN PART
RITE AID'S MOTION FOR
SUMMARY JUDGMENT**

This matter comes before the Court on “Rite Aid’s Motion for Summary Judgment Dismissing Plaintiffs’ Third Through Tenth Causes of Action.” Dkt. # 31. Summary judgment is appropriate when, viewing the facts in the light most favorable to the nonmoving party, there is no genuine dispute as to any material fact that would preclude the entry of judgment as a matter of law. L.A. Printex Indus., Inc. v. Aeropostale, Inc., 676 F.3d 841, 846 (9th Cir. 2012). The party seeking summary dismissal of the case “bears the initial responsibility of informing the district court of the basis for its motion” (Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986)) and identifying those portions of the materials in the record that show the absence of a genuine issue of material fact (Fed. R. Civ. P. 56(c)(1)). Once the moving party has satisfied its burden, it is entitled to summary judgment if the non-moving party fails to identify specific factual disputes that must be resolved at trial. Hexcel Corp. v. Ineos Polymers, Inc., 681 F.3d 1055, 1059 (9th Cir. 2012). The mere existence of a scintilla of evidence in support of the non-moving

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1 party's position will not preclude summary judgment, however, unless a reasonable jury viewing
 2 the evidence in the light most favorable to the non-moving party could return a verdict in its
 3 favor. U.S. v. Arango, 670 F.3d 988, 992 (9th Cir. 2012).

4 Having reviewed the memoranda, declarations, and exhibits submitted by the
 5 parties in the light most favorable to plaintiffs and having heard the arguments of counsel, the
 6 Court finds as follows:

7 **A. Quantum Meruit (Third Cause of Action)**

8 A party to an express contract may not bring an action based on an implied or
 9 quasi-contract related to the same matter. Chandler v. Wash. Toll Bridge Auth., 17 Wn.2d 591,
 10 604 (1943); Lance Camper Mfg. Corp. v. Republic Indem. Co., 51 Cal. Rptr.2d 622, 628 (Cal.
 11 App. 1996). Plaintiffs' right to recover for services rendered and/or costs expended was
 12 established by the terms of the leases that governed the Concord, Silverdale, Bremerton, Port
 13 Angeles, Everett, Blaine, San Pablo, Santa Rosa, Oakley, and Sunnyvale projects. Plaintiffs do
 14 not challenge the validity of those contracts, but simply argue that a quasi-contractual theory
 15 should be available to them if the contracts do not provide recovery. Neither Washington nor
 16 California law support such a proposition.

17 With regards to the Poulsbo project, plaintiffs may not get around the statute of
 18 frauds by supplying the missing terms by implication. Henry v. Green, 143 Wn. App. 1007
 19 (2008) (quoting Cushing v. Monarch Timber Co., 75 Wash. 678, 687 (1913)). Nor have
 20 plaintiffs raised a reasonable inference that Poulsbo Holding's acquisition of property and
 21 preliminary attempts to develop a pharmacy on the site provided any benefit to Rite Aid. It is
 22 undisputed that the pharmacy was never built, and there is no evidence that the real property or
 23 any other asset was turned over to Rite Aid. Plaintiff's conjecture that its work "provided Rite
 24 Aid with valuable information regarding these markets" and an "opportunity to develop the
 25 stores" is unsupported. Dkt. # 44 at 5. Rite Aid sought to lease a pharmacy from plaintiffs, not

1 acquire options on empty lots or obtain plat approvals that were never developed. Absent
 2 evidence that Rite Aid obtained possession of an asset or that the work plaintiffs did materially
 3 advanced subsequent efforts to build a pharmacy in Poulsbo, plaintiffs have not raised a genuine
 4 issue of fact as to the benefit prong of a quantum meruit claim.

5 **B. Promissory Estoppel (Fourth Cause of Action)**

6 Promissory estoppel requires, “(1) [a] promise which (2) the promisor should
 7 reasonably expect to cause the promisee to change his position and (3) which does cause the
 8 promisee to change his position (4) justifiably relying upon the promise, in such a manner that
 9 (5) injustice can be avoided only by enforcement of the promise.” Corbit v. J.I. Case Co., 70
 10 Wn.2d 522, 539 (1967). See also U.S. Ecology, Inc. v. State, 28 Cal. Rptr.3d 894, 901 (Cal.
 11 App. 2005). Plaintiffs’ promissory estoppel claim is an alternative to or adjunct of its breach of
 12 contract claim: if the factfinder were to conclude that the agreed-upon extensions of the delivery
 13 dates for Concord, Port Angeles, Everett, Blaine, San Pablo, Santa Rosa, Oakley, and Sunnyvale
 14 lacked consideration or were otherwise unenforceable in contract, plaintiffs may seek a
 15 balancing of the equities in order to avoid injustice. See Corey v. Pierce County, 154 Wn. App.
 16 752, 768 (2010); Kim v. Dean, 133 Wn. App. 338, 346-47 (2006); Kajima/Ray Wilson v. Los
 17 Angeles County Metro. Transp. Auth., 1 P.3d 63, 66 (Cal. 2000). Plaintiffs may, therefore,
 18 proceed on their promissory estoppel claim as to Concord, Port Angeles, Everett, Blaine, San
 19 Pablo, Santa Rosa, Oakley, and Sunnyvale.¹

20 The promissory estoppel claim fails with regards to the Silverdale, Bremerton, and
 21 Poulsbo projects, however. Promissory estoppel requires, in the first instance, a promise:
 22 “although promissory estoppel may apply in the absence of mutual assent or consideration, the

23
 24 ¹ In reply, Rite Aid argues that plaintiffs will not be able to establish damages arising from their
 25 reliance on the delivery dates set forth in the T-rex reports. This issue was not timely raised and has not
 26 been considered in ruling on this motion.

1 doctrine may not be used as a way of supplying a promise.” Havens v. C&D Plastics, Inc., 124
 2 Wn.2d 158, 173 (1994). There is no evidence that defendants promised to extend the delivery
 3 dates for the Silverdale and Bremerton projects beyond December 2010, when the termination
 4 letters were sent.

5 With regards to Poulsbo, the Washington Supreme Court has consistently declined
 6 to adopt Restatement (Second) of Contracts § 139, which would allow a party to use promissory
 7 estoppel to avoid the statute of frauds. See Greaves v. Med. Imaging Sys., Inc., 124 Wn.2d 389,
 8 398-401 (1994). While there is some indication that Washington courts might be willing to
 9 ignore the statute if its application would be “grossly unjust” (Lectus, Inc. v. Rainier Nat'l Bank,
 10 97 Wn.2d 584, 588 (1994)), that is not the case here. As discussed more fully in the “Order
 11 Granting in Part Thrifty’s Motion for Partial Summary Judgment,” the parties never reached an
 12 agreement regarding a key term of the Poulsbo lease – the rental amount. Defendants made no
 13 promises as to the amount they would pay in rent, no lease was signed, and plaintiffs were fully
 14 aware of these facts. Plaintiff Nicholson was an experienced real estate developer who knew the
 15 requirements of the statute of frauds and yet failed to provide defendants with the cost and
 16 expense data they needed to calculate the rental payment and finalize the contract. There is no
 17 indication that defendants misled plaintiffs into believing that a partial oral agreement for a
 18 twenty year lease of real property would be effective: plaintiffs’ efforts to develop the Poulsbo
 19 site were made on the hopeful assumption that the parties would eventually reach agreement, not
 20 in reasonable reliance on any promise made by defendants. If the equities in Greaves did not
 21 warrant the adoption of Restatement (Second) of Contracts § 139, the circumstances of this case
 22 certainly do not.

23 **C. Breach of Fiduciary Duty (Fifth Cause of Action)**

24 Plaintiffs have abandoned their breach of fiduciary duty claim.
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1 **D. Washington Consumer Protection Act (“CPA”) (Sixth Cause of Action)**

2 The CPA prohibits “[u]nfair methods of competition and unfair or deceptive acts
 3 or practices in the conduct of any trade or commerce.” RCW 19.86.020. A private cause of
 4 action exists under the CPA if (1) the conduct is unfair or deceptive, (2) occurs in trade or
 5 commerce, (3) affects the public interest, and (4) causes injury (5) to plaintiff’s business or
 6 property. Hangman Ridge Training Stables, Inc. v. Safeco Title Ins. Co., 105 Wn.2d 778, 780
 7 (1986). Defendant argues that the termination of the leases was not “unfair or deceptive” and
 8 that this private contract dispute does not affect the public interest.

9 The CPA does not define “unfair or deceptive.” It is up to the courts, through a
 10 “gradual process of judicial inclusion and exclusion,” to determine whether a particular act is
 11 unfair or deceptive. Saunders v. Lloyd’s of London, 113 Wn.2d 330, 344 (1989); Klem v.
 12 Wash. Mut. Bank, 176 Wn.2d 771, 786 (2013) (“Given that there is no limit to human
 13 inventiveness, courts, as well as legislatures, must be able to determine whether an act or
 14 practice is unfair or deceptive to fulfill the protective purposes of the CPA.”) (internal quotation
 15 marks omitted); Leingang v. Pierce County Med. Bureau, Inc., 131 Wn.2d 133, 150 (1997). In
 16 making that determination, courts consider whether defendants misrepresented something of
 17 material importance (Holiday Resort Cmtys. Ass’n v. Echo Lake Assocs., LLC, 134 Wn. App.
 18 210, 226 (2006)), whether the statement or act has the capacity to deceive a substantial portion
 19 of the population (Sing v. John L. Scott, Inc., 134 Wn.2d 24, 30 (1997)), and whether the act
 20 constitutes a per se violation of a statute or a violation of the public interest (Klem, 176 Wn.2d at
 21 787). The Court will assume, for purposes of this motion, that agreeing to extend a contractual
 22 deadline, accepting continuing performance as if the contract had been extended, and then
 23 unilaterally enforcing the original deadline is an “unfair” practice.

24 To be actionable under the CPA, the unfair practice must also affect the public
 25 interest. Indoor Billboard/Wash., Inc. v. Integra Telecom of Wash., Inc., 162 Wn.2d 59, 74

1 (2007). Where the transaction is a private, contractual dispute affecting no one but the parties, it
 2 is ordinarily not an act or practice affecting the public interest. Hangman Ridge, 105 Wn.2d at
 3 790.

4 [I]t is the likelihood that additional plaintiffs have been or will be injured in
 5 exactly the same fashion that changes a factual pattern from a private dispute to
 6 one that affects the public interest. . . . Factors indicating public interest in this
 7 context include: (1) Were the alleged acts committed in the course of defendant's
 8 business? (2) Did defendant advertise to the public in general? (3) Did defendant
 actively solicit this particular plaintiff, indicating potential solicitation of others?
 (4) Did plaintiff and defendant occupy unequal bargaining positions?

9 Hangman Ridge, 105 Wn.2d at 790-91 (internal citation omitted). Plaintiffs argue that the
 10 public interest element is satisfied because defendants terminated thirty-three development
 11 projects between January 1, 2008, and December 31, 2011. Eleven of those terminations
 12 represent plaintiffs' projects. The remaining twenty-two projects were handled by nine other
 13 preferred developers. Although it is clear that any statements and acts aimed at these nine
 14 developers occurred in the course of defendants' business, there are no facts from which one
 15 could infer that the business relationships grew out of advertisements to the general public, that
 16 defendants solicited the developers, that any such advertisements or solicitations misled or
 17 misrepresented a material fact, or that the contracting parties occupied unequal bargaining
 18 positions. There is also no indication that any of these nine developers suffered the "unfair"
 19 practice alleged by plaintiff: the circumstances surrounding the twenty-two terminations are
 20 unknown. Plaintiffs request an opportunity to conduct discovery regarding this critical element
 21 of their CPA claim. Because discovery is not scheduled to close for another six months, the
 22 motion for judgment on the CPA claim is denied without prejudice to its being raised again.

23 **E. California Business and Professions Code § 17200 (Seventh Cause of Action)**

24 California's Unfair Competition Law ("UCL") precludes "unlawful, unfair or
 25 fraudulent business act[s] or practice[s] . . ." Cal. Civ. Code § 17200. "While the scope of
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1 conduct covered by the UCL is broad, its remedies are limited. A UCL action is equitable in
 2 nature; damages cannot be recovered.” Korea Supply Co. v. Lockheed Martin Corp., 63 P.3d
 3 937, 943 (Cal. 2003). Section 17203 of the Business and Professions Code authorizes injunctive
 4 relief and the restoration “to any person in interest any money or property, real or personal,
 5 which may have been acquired by means of such unfair competition.”

6 Plaintiffs seek to recover “restitution for benefits conferred on another party.”
 7 Dkt. # 44 at 12. As noted above, however, there is no evidence that plaintiffs’ unsuccessful
 8 attempts to acquire and develop property in various locations bestowed a benefit on defendants
 9 or, in the parlance of § 17203, that defendants “acquired” any money or property by means of
 10 their allegedly deceptive promise to extend the delivery deadlines. The pharmacies were never
 11 built and there is no indication that the aborted developments aided defendants in any way. An
 12 order for restitution under the UCL is one that compels “defendant[s] to return money obtained
 13 through an unfair business practice to those persons in interest from whom the property was
 14 taken, that is, to persons who had an ownership interest in the property” State v. Altus
 15 Finance, S.A., 116 P.3d 1175, 1188 (Cal. 2005) (quoting Kraus v. Trinity Mgmt. Serv., Inc., 999
 16 P.2d 718, 725 (2000)). Plaintiff’s conjecture that its work benefitted defendants is insufficient to
 17 raise a genuine issue of fact regarding an essential element of their UCL claim.²

18 F. Punitive Damages (Eighth Cause of Action)

19 Plaintiffs have abandoned their claim for punitive damages.

20 G. Tortious Interference (Ninth Cause of Action)

21 Plaintiffs have abandoned their tortious interference claim.

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24 ² To the extent plaintiffs seek recovery of costs and expenses incurred in reliance on defendants’
 25 promises to extend the delivery due dates on the projects, the claim is one for damages that are not
 26 recoverable under the UCL.

1 **H. Liability on Guaranties (Tenth Cause of Action)**

2 Rite Aid argues that it can have no liability on its guaranty of defendant Thrifty's
3 lease obligations because the leases were validly terminated. For the reasons stated in the
4 "Order Granting in Part Thrifty's Motion for Partial Summary Judgment," plaintiffs cannot
5 establish liability on the leases for the Poulsbo, Silverdale, and Bremerton projects: Rite Aid
6 cannot be liable as guarantor if the principal obligor is not liable. Plaintiffs may, however, seek
7 to hold Rite Aid liable on its guaranties related to Concord, Port Angeles, Everett, Blaine, San
8 Pablo, Santa Rosa, Oakley, and Sunnyvale.

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10 For all of the foregoing reasons, Rite Aid's motion for summary judgment is
11 GRANTED in part and DENIED in part. Plaintiffs' quantum meruit, fiduciary duty, UCL,
12 punitive damage, and tortious interference claims against Rite Aid are dismissed in their entirety.
13 Plaintiffs' promissory estoppel claim is dismissed as to the Poulsbo project only. Plaintiffs'
14 guaranty claim is dismissed as to the Poulsbo, Silverdale, and Bremerton projects. Plaintiffs
15 may proceed on their promissory estoppel claim as to Concord, Silverdale, Bremerton, Port
16 Angeles, Everett, Blaine, San Pablo, Santa Rosa, Oakley, and Sunnyvale and on their guaranty
17 claim as to Concord, Port Angeles, Everett, Blaine, San Pablo, Santa Rosa, Oakley, and
18 Sunnyvale. Plaintiffs may also proceed with discovery related to their CPA claim.

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20 Dated this 18th day of February, 2014.

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22 Robert S. Lasnik
23 United States District Judge
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